Supreme Court, U.S.
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No. 94-675

In the Supreme Court of the United States

OCTOBER TERM, 1994

JERE LAWRENCE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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6 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252 (1988 & Supp. V 1993), which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face.

2. Whether the indictment in this case adequately alleged the essential elements of petitioner's offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45-47) is unpublished, but the decision is noted at 28 F.3d 116 (Table). The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 40-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1994. The petition for a writ of certiorari was filed on September 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of knowingly causing the transportation in foreign commerce of visual depictions of minors engaging in sexually explicit acts, in violation of 18 U.S.C. 2252(a)(1) (1988 & Supp. V 1993), and of knowingly receiving such a visual depiction, in violation of 18 U.S.C. 2252(a)(2) (1988 & Supp. V 1993). He was sentenced to 21 months' imprisonment, to be followed by three years of supervised release, and was fined $7,000. The court of appeals affirmed.

1. In February 1989, the Federal Bureau of Investigation (FBI) learned that petitioner, a fourth-grade school teacher, was on the mailing list of a Portuguese company under investigation for distributing child pornography. In September 1989, the FBI received a videotape featuring child pornography that had been mailed from Paris, France, to petitioner's post office box but was misdelivered to another box. In December 1989, the FBI learned that petitioner had received correspondence from a German distributor of child pornography. Gov't C.A. Br. 3-5.

Based on that information, the FBI obtained a search warrant for petitioner's residence. During the ensuing search, agents seized videotapes, magazines, and advertisements and order forms from child pornography distributors. One of the videotapes featured photographs of naked, pre-pubescent boys at the beach. Gov't C.A. Br. 6.

2. On appeal, petitioner contended that 18 U.S.C. 2252 (1988 & Supp. V 1993), which proscribes the transportation, shipping, receipt, distribution, and possession of child pornography, is unconstitutional in that it does

not require the government to prove that the defendant knew that the materials at issue showed minors engaging in sexually explicit acts. In an unpublished *per curiam* opinion, the court of appeals rejected that claim without discussion. Pet. App. 45-47.

ARGUMENT

1. Petitioner renews his contention that Section 2252 does not require proof of scienter as to the minority of the performer shown engaging in sexually explicit acts, and that the statute is therefore unconstitutional. On November 29, 1994, this Court issued its opinion in *United States* v. *X-Citement Video, Inc.*, No. 93-723, holding that Section 2252 requires knowledge of the minority of the performers depicted engaging in sexually explicit conduct and that the statute, so construed, is constitutional. Petitioner's claim is therefore without merit.

2. Petitioner argues (Pet. 10-14) that, even if Section 2252 is constitutional, his convictions should be reversed because the indictment failed to allege the requisite scienter.[1] That claim is not properly before this Court. Petitioner did not challenge the indictment on that ground in the district court. In the court of appeals, he raised the claim for the first time in his reply brief, and the court of appeals did not address it. Accordingly, petitioner has failed to preserve the claim for review by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

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[1] In *X-Citement Video*, this Court declined to address the issue whether the indictment in that case "was fatally defective because it did not contain a scienter requirement on the age of minority," slip op. 15, because the court of appeals had not reached the issue.

In any event, petitioner's challenge to the indictment is without merit. Counts 2 and 3 of the indictment, on which petitioner was convicted, closely tracked the language of Section 2252, charging petitioner with "knowingly" causing the transportation in foreign commerce of visual depictions of minors engaging in sexually explicit acts, and with "knowingly" receiving such a visual depiction. Pet. App. 2-3. In light of this Court's holding in *X-Citement Video* that the word "knowingly" in Section 2252 applies to the minority of the performer, the indictment adequately alleged the essential elements of the offense. See *United States* v. *Cochran*, 17 F.3d 56, 61 (3d Cir. 1994), cert. denied, No. 93-8697 (Dec. 5, 1994).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1994

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[2] In refusing to dismiss the indictment, the district court construed Section 2252 to require "recklessness" with respect to the minority status of those depicted engaging in sexually explicit conduct. See Pet. App. 40-43. The court appears to have instructed the jury in accordance with that standard. See Pet. 10. Petitioner did not contend in either of the courts below, however, that the jury instructions improperly permitted him to be convicted on the basis of recklessness rather than knowledge, nor does he advance such a claim in this Court.